

REMARKS:

The Advisory Action dated May 18, 2010, has been received and the preceding amendments and following remarks form a full and complete response thereto. New claim 16 has been added. No new matter is added.

Response to rejections under 35 U.S.C. § 103

Claims 1, 2, 11, and 14 were rejected under 35 U.S.C. § 103(a) as being obvious over Wachendorff-Neumann (U.S. 6,787,567). The Applicants respectfully submit that Wachendorff-Neumann only discloses that the combination of methoximinoacetamide derivatives of formula (I) and one of 58 listed fungicides may have synergistic effects. There is no disclosure in Wachendorff-Neumann that the combination of the presently claimed combination is synergistic. Moreover, there is no suggestion that anything other than combinations of methoximinoacetamide derivatives of formula (I) with fungicides would be synergistic. Wachendorff-Neumann only provides evidence that the combination of the compound of formula Ib and copper oxychloride has a synergistic effect (see Example, col. 29). Applicants submit that, taking into account only the knowledge which was within the level of ordinary skill in the art at the time the claimed invention was made, which is merely that combining methoximinoacetamide derivatives of formula (I) with a fungicide selected from the list in Wachendorff-Neumann *may* have synergism, did not suggest that the combination of prothioconazole and trifloxystrobin would indeed have a synergistic effect.

New claim 16 has been added to further distinguish the claims from Wachendorff-Neumann. Claim 16, is limited to a mixture wherein the combination of

prothioconazole of the formula I and trifloxystrobin of the formula II is responsible for the synergistic fungicidal effect. Support for this mixture is found in Tables 2 and 4 and throughout the specification. In Wachendorff-Neumann, methoximinoacetamide derivatives of formula (I) are essential to, and found in, the synergistic effects alleged therein. There is no mention or suggestion that the combination of prothioconazole of the formula I and trifloxystrobin, in the absence of a methoximinoacetamide derivative, would have a synergistic effect. Accordingly, because the subject matter of claim 16 is not rendered obvious by Wachendorff-Neumann, Applicants respectfully request an indication of allowance for claim 16.

Claim 15 was rejected under 35 U.S.C. § 103(a) as being obvious over Dutzmann et al. (WO 98/47367) evidenced by its English equivalent, U.S. 6,306,850 in view of Duvert et al. (WO 00/47047), evidenced by its English equivalent U.S. 6,797,301. The Examiner asserted that Dutzmann discloses combinations of prothioconazole (compound I) and azoxystrobin (compound XII) in Table 1, col. 25. The Examiner asserts that Dutzmann shows a synergistic combination of prothioconazole and azoxystrobin. In the Office Action dated December 3, 2009, the Examiner acknowledges that Dutzmann does not disclose a composition consisting of prothioconazole and trifloxystrobin, but asserts that Duvert discloses that strobilizing fungicides like azoxystrobin and trifloxystrobin are functionally equivalent in their ability to inhibit mitochondrial respiration in fungi. However, in the Advisory Action, in response to Applicant's arguments against Dutzmann, the Examiner has incorrectly asserted that Dutzmann discloses that prothioconazole (compound I) when applied at

2.5 g/ha has a pesticidal efficacy of 21% whereas when applied at 0.5 g/ha has a pesticidal efficacy of 0 and that trifloxystrobin (compound XII) when applied in an amount of 2.5 g/ha has an efficacy of 59%. The examiner asserts that when compound I and XII are used together in an amount of 0.5 and 2.5 g/ha, the combination is expected to have an activity of 59%. However, the combination was found to actually have an activity of 75%. Thus, the examiner asserts that synergy appears to be occurring. Applicants submit that, in actuality, compound XII is NOT trifloxystrobin. Rather, compound XII is azoxystrobin, which Applicants have argued is not obviously equivalent to trifloxystrobin. Applicants respectfully request that the examiner not ignore the argument that these two compounds cannot be considered functionally equivalent, and withdraw the rejection that incorrectly alleges that Dutzmann discloses the synergistic combination of prothioconazole and trifloxystrobin.

The cited disclosure in Duvert states “[a]mong the fungicide compounds inhibiting mitochondrial respiration there may be mentioned, for example, strobilurin and analogous compounds or derivatives, such as for example azoxystrobin, kresoxim-methyl, trifloxystrobin....” Thus, Duvert does not make any mention of functional equivalency, but merely lists azoxystrobin and trifloxystrobin as analog compounds or derivatives of strobilurin. Applicants submit that it is improper and nonsensical to assume synergistic properties when combining two substances based on a list of fungicide names. Applicants submit that in the absence of a showing that the combination would be synergistic, one of ordinary skill would not assume that combining any fungicide that inhibits mitochondrial respiration with another fungicide would obviously result in synergistic fungicidal activity. According to MPEP § 2143.02, a

“rationale to support a conclusion that a claim would have been obvious is that all the claimed elements were known in the prior art and one skilled in the art could have combined the elements as claimed by known methods with no change in their respective functions, and the combination would have yielded nothing more than predictable results to one of ordinary skill in the art.” Applicants submit that one of ordinary skill would not have had a reasonable expectation of success in making a synergistic mixture when combining the Dutzmann and Duvert references because 1) there is no proof of functional equivalence, 2) alleged functional equivalence, i.e., inhibiting mitochondrial respiration, does not obviously indicate that a combination with some other fungicide would result in synergistic effect, and 3) synergism is not a predictable result. The present application presents experimental evidence of synergistic results. None of the cited references suggest the claimed mixture consisting of prothioconazole or its salts or adducts and trifloxystrobin or its salts or adducts. Thus, based on the above reasoning, Applicants respectfully request that the rejection claim 15 be withdrawn.

Conclusions

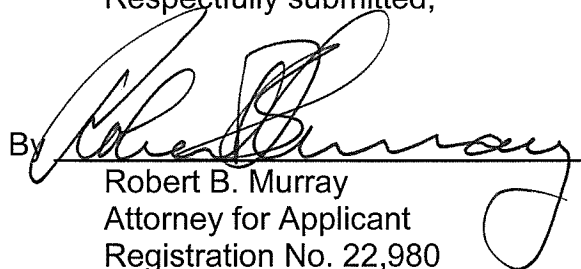
In view of the above amendments and remarks hereto, Applicants believe that all of the Examiner’s rejections set forth in the Office Action and the Advisory Action have been fully overcome and that the present claims fully satisfy the patent statutes. Applicants, therefore, believe that the application is in condition for allowance.

The Director is authorized to charge any fees or overpayment to Deposit Account No. 02-2135.

The Examiner is invited to telephone the undersigned if it is deemed to expedite allowance of the application.

Respectfully submitted,

By

A handwritten signature in black ink, appearing to read "Robert B. Murray", is written over a horizontal line.

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